Public Prosecutor v Mohd Bandar Shah bin Nordin & Anor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–50 OF 2005

GOPAL SRI RAM, AHMAD MAAROP AND SULAIMAN DAUD JJCA

14 MAY 2008

Evidence — Circumstantial evidence — Nature of — Failure to apply test expounded in Chan Chwen Kong v Public Prosecutor [1962] MLJ 307 — Whether failure constituted a serious misdirection

Evidence — Credibility — Assessment of — Discrepancies between police report and oral testimony — Failure by judge to consider whether oral testimony so improbable that it warranted no weight whatsoever — Whether failure a serious misdirection

Evidence — Credibility — Impeachment — Judge impeaching credit of prosecution witness because of alleged contradictions between evidence in court and as contained in police report — Whether contradictions merely omissions — Whether judge had erred in impeaching credibility of witness

The High Court acquitted and discharged the respondents on a charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code, without calling upon their defence. The prosecution appealed to the Court of Appeal. The High Court judge acquitted the respondents on two main grounds. First, the judge found PW3, a police officer, to be a witness unworthy of credit and had his evidence impeached. The judge made such a decision on the evidence of PW3 as he felt there were material contradictions between the evidence of PW3 in court and what he had stated in his police report, exh D20. The judge also held PW3's evidence to be wanting in credibility. Second, the High Court judge held that there were insufficient circumstances to establish that the respondents had trafficked in the proscribed drug in question. The prosecution argued on appeal that the High Court judge had further misdirected himself when considering the circumstantial evidence adduced to incriminate the respondents. The judge had also overlooked two critical pieces of evidence which linked the second respondent to the crime, complained the prosecution.

Held, allowing the appeal:

(1) PW3 had merely stated more in his evidence than what he had set out in his police report, exh D20. The omissions in D20 ought not to have been relied upon by the judge in concluding that PW3 was a witness unworthy of credit. Having read and reread both PW3's evidence at the trial and his police report (exh D20), the court was satisfied that objectively speaking, PW3 was a witness worthy of credit. The trial judge had thus misdirected himself in a material particular by impeaching the credit of PW3. PW3 ought therefore to be restored as a witness worthy of credit (see paras 3 & 5).

(2) In the instant case, the High Court judge's sole ground for rejecting the evidence of PW3 as wanting in credibility were the contradictions in or conflict between his evidence and the contents of exh D20. Unfortunately, the judge did not direct his mind to the critical question: was the evidence of PW3 so improbable that it warranted to be given no weight whatsoever? This constituted a serious misdirection on the part of the learned judge. Additionally, except for a very cursory reference to PW4 and PW5 there was nothing in his grounds of judgment to show that the judge had considered and evaluated the evidence of these witnesses (see para 7).

(3) On the facts, there was merit in the prosecution's complaint that the trial judge had misdirected himself when considering the circumstantial evidence adduced before him. The trial judge did not apply the test laid down in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307, which constituted a serious misdirection. There was no proper evaluation by the judge of the circumstantial evidence led by the prosecution. Thus, based on the combined strength of the individual strands of the circumstances present, a reasonable tribunal properly directing itself on the law and the facts would have come to the conclusion that the totality of the evidence reasonably supported an irresistible prima facie inference that the respondents were found in possession of the proscribed drug. In other words they had mens rea possession of the drugs in question (see para 10).

(4) The trial judge had also overlooked two critical pieces of evidence which linked the second respondent to the crime; ie his close proximity to the drugs and his conduct in fleeing when the police identified themselves. These were strong and cogent pieces of evidence which rendered the circumstances identified by the judge in dispelling a common intention, to be of little or no weight (see para 12).

[Bahasa Malaysia summary

Mahkamah Tinggi telah membebaskan dan melepaskan

responden-responden atas pertuduhan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dibaca bersama s 34 Kanun Keseksaan, tanpa memanggil pembelaan mereka. Pihak pendakwaan merayu ke Mahkamah Rayuan. Hakim Mahkamah Tinggi telah membebaskan responden-responden atas dua alasan utama. Pertama, hakim mendapati PW3, seorang pegawai polis, saksi yang tidak boleh dipercayai dan keterangannya dicabar. Hakim membuat keputusan sebegini atas keterangan PW3 kerana beliau merasakan terdapat percanggahan yang ketara antara keterangan PW3 di mahkamah dan apa yang dinyatakan olehnya dalam laporan polis, eksh D20. Hakim juga memutuskan tentang kebolehpercayaan keterangan PW3. Kedua, hakim Mahkamah Tinggi telah memutuskan bahawa terdapat keadaan yang tidak mencukupi untuk membuktikan bahawa responden-responden telah mengedar dadah haram yang dipersoalkan itu. Pihak pendakwaan berhujah semasa rayuan bahawa hakim Mahkamah Tinggi telah salah memberikan arahan semasa mempertimbangkan dua keterangan ikut keadaan yang dikemukakan untuk menunjukkan responden-responden bersalah. Hakim juga terlepas perhatian terhadap dua keterangan yang kritikal yang mengaitkan responden kedua dengan jenayah tersebut, seperti yang diadukan oleh pihak pendakwaan.

Diputuskan, membenarkan rayuan:

(1) PW3 hanya menyatakan lebih dalam keterangannya dari apa yang telah dinyatakan dalam laporan polisnya, eksh D20. Peninggalan dalam D20 tidak patut digunakan oleh hakim dalam membuat kesimpulan bahawa PW3 adalah saksi yang tidak boleh dipercayai. Setelah membaca dan membaca semula kedua-dua keterangan PW3 semasa perbicaraan dan laporan polisnya (eksh D20), mahkamah berpuas hati bahawa secara objektifnya, PW3 adalah saksi yang boleh dipercayai. Hakim perbicaraan oleh itu telah tersalah arah khususnya dengan mencabar kebolehpercayaan PW3. PW3 patut dikembalikan sebagai saksi yang boleh dipercayai (lihat perenggan 3 & 5).

(2) Dalam kes ini, satu-satunya alasan hakim Mahkamah Tinggi untuk menolak keterangan PW3 sebagai tidak boleh dipercayai merupakan percanggahan dalam atau konflik antara keterangannya dan kandungan eksh D20. Malangnya, hakim tidak mengarahkan pemikirannya kepada persoalan kritikal: adakah keterangan PW3 tidak mungkin berlaku sehingga mewajarkannya tidak diberikan perhatian langsung? Ini membentuk salah arah serius di pihak hakim yang bijaksana. Tambahan pula, kecuali untuk setiap rujukan sepintas lalu kepada PW4 dan PW5 tidak ada apa-apa dalam alasan penghakimannya untuk menunjukkan bahawa hakim tersebut telah menimbangkan dan meneliti keterangan saksi-saksi tersebut (lihat perenggan 7).

(3) Atas fakta, terdapat merit dalam aduan pihak pendakwaan bahawa hakim perbicaraan telah salah arah semasa menimbangkan keterangan ikut keadaan yang dikemukakan di hadapan beliau. Hakim perbicaraan tidak menggunakan ujian yang dinyatakan dalam *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307, yang membentuk salah arah serius. Tiada penilaian sewajarnya oleh hakim terhadap keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan. Oleh itu, berdasarkan gabungan kekuatan setiap keadaan yang wujud, tribunal yang munasabah dalam mengarah dengan wajar atas undang-undang dan fakta akan tiba kepada kesimpulan bahawa keseluruhan keterangan agak menyokong inferens prima facie yang responden-responden didapati memiliki dadah yang diharamkan itu. Dalam perkataan lain mereka mempunyai mens rea milikan dadah yang dipersoalkan (lihat perenggan 10).

(4) Hakim perbicaraan juga terlepas perhatian dua keterangan yang mengaitkan responden kedua dengan jenayah tersebut, iaitu dia berada berdekatan dengan dadah tersebut dan kelakuannya melarikan diri apabila polis mengenalkan diri mereka. Keterangan tersebut adalah keterangan yang kukuh dan meyakinkan yang menjadikan keadaan yang dikenal pasti oleh hakim dalam melenyapkan niat bersama, mempunyai sedikit atau tiada beban langsung (lihat perenggan 12).]

Notes

For a case on nature of circumstantial evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 634.

For cases on assessment of credibility, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1020–1021.

For cases on impeachment of credibility, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1033–1044.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)

Chan Chwen Kong v PP [1962] MLJ 307 (refd)

Dasu v State (1985) Cri LJ 1933 (folld)

Mahbub Shah v Emperor AIR 1945 PC 118 (refd)

Muthusamy v PP [1948] MLJ 57 (refd)

Pandurang v State of Hyderabad AIR 1955 SC 216 (refd)

PP v Datuk Harun bin Haji Idris [1977] 1 MLJ 14 (refd)

PP v Foo Jua Eng [1966] 1 MLJ 197 (refd)

PP v Mohamed Ali [1962] MLJ 257 (refd)

Tengku Mahmood v PP [1974] 1 MLJ 110 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a)
Evidence Act 1950 s 155(c)
Penal Code s 34

Appeal from: Criminal Trial No 45–36 of 2002 (High Court, Ipoh)

Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Gurbachan Singh s/o Bagawan Singh (Sakthivel a/l Nagalingam with him) (Jagjit, Kerpal & Sakhthi) for the first respondent.
Gurbachan Singh s/o Bagawan Singh (Bachan & Kartar) for the second respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This is an appeal by the public prosecutor against the decision of the High Court in Ipoh acquitting and discharging the respondents on the charge framed under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code without calling upon their defence. The facts relevant to this appeal may be shortly stated. On 24 January 2002 at about 10pm PW3, PW4 and PW5, all police officers were on their rounds. At about that time they came to the Tapah rest area. Their evidence is that they saw the respondents acting suspiciously. According to PW3 and PW5 the first respondent was seated on a motorcycle No AEF 2360. The second respondent was standing next to the motorcycle. The police, suspecting that something was afoot, approached the two respondents and identified themselves as police officers. Thereupon the respondents took flight. They ran in different directions. They were eventually apprehended. While his fellow policemen were pursuing the respondents PW5 stood guard over the motorcycle. He noticed a black sling bag ('exh P12') in the motorcycle's carrier. After their arrest the respondents were taken to the police station where PW3 lodged a police report ('exh D20'). The contents of exh P12 were sent to the chemist who after a chemical analysis found it to be 976g of cannabis. The respondents were then charged with the offence of trafficking.

[3] The learned trial judge acquitted the respondents on two main grounds. First, he found PW3 to be a witness unworthy of credit and therefore had his evidence impeached. Besides this he also held PW3's evidence to be wanting in credibility. Second, he held that there were insufficient circumstances to establish that the respondents had trafficked in the proscribed drug in

question. Taking the first point, the learned judge's decision on the evidence of PW3 turned on what he considered to be material contradictions between the evidence of that witness in court and what he had stated in exh D20. In fairness to the learned judge it must be said that he listed the contradictions that warranted a finding that PW3 was a witness unworthy of credit under s 155(c) of the Evidence Act 1950. The learned deputy who has argued this appeal has submitted that the discrepancies upon which the learned judge relied are in truth nothing more than mere omissions. In ably putting the case for the appellant before us, she submitted that a witness' credit should not be impeached for mere omissions save in exceptional cases. It is the public prosecutor's contention that PW3 had merely stated more in his evidence than what he had set out in his police report exh D20. In other words the omissions in D20 ought not to have been relied upon by the learned judge in arriving at the conclusion that PW3 was a witness unworthy of credit. With these arguments we are entirely in agreement.

[4] In *Muthusamy v Public Prosecutor* [1948] MLJ 57, the locus classicus on the subject under discussion, Taylor J had this to say:

> A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence.

Again in *Dasu v State* (1985) Cri LJ 1933, at p 1938 the court held as follows:

> In order to see whether there is a contradiction by omission it is necessary to find out whether the two statements cannot stand together. It is also necessary to see whether the statement which the witness has made in the witness-box should have been made by him while reporting the matter soon after the incident. If the two statements made by the witness cannot stand together and the statement in the court is such that the witness would necessarily have made at the time of his earlier statement, then alone omission thereof can be considered to be a contradiction.

[5] Applying the test in *Dasu*, we are unable to say with any conviction that the statements made by PW3 on oath would necessarily had been made by him in exh D20. Having read and reread both PW3's evidence at the trial and his police report exh D20, we are satisfied that objectively speaking he was a witness worthy of credit. Accordingly, in our judgment, the learned trial judge misdirected himself in a material particular by impeaching the credit of this witness. We would therefore restore PW3 as a witness worthy of credit. No taint should accordingly attach to him.

[6] We now turn to the argument directed at the credibility of PW3. Learned counsel for the respondents in a very carefully formulated and formidable argument has submitted that whatever may be the learned judge's finding on PW3's credit this court should in accordance with settled principle not interfere with the trial judge's conclusion that the witness was not

credible. In approaching issues of credibility it is always necessary to bear in mind the tests that a trier of fact should ordinarily apply when evaluating oral evidence. One of the tests is motive. The presence or absence of motive on the part of a witness is a relevant consideration which a trial court should take into account. See *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110. Another relevant consideration are probabilities of the case. If a witness' evidence is improbable, this would be a good reason for rejecting his evidence or according it very little weight. By the same token, where the evidence of a witness accords with the probabilities of the case, it would be a serious misdirection on the part of the trial court to give it little or no weight on grounds of credibility. When there is a conflict of evidence in or between the testimony of witnesses, it is the duty of the trier of fact to warn himself of the danger of acting upon the evidence of a given witness. Contradictions within and between the evidence of witnesses there are always bound to be. But that is not a good reason by itself to hold the evidence of a witness to be lacking in credibility. See *Public Prosecutor v Datuk Harun bin Haji Idris* [1977] 1 MLJ 14. In respect of the assessment of evidence of police officers we can do no better than to quote from the judgment of Thomson CJ in *Public Prosecutor v Mohamed Ali* [1962] MLJ 257:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[7] In the present case, the learned judge quite rightly found no evil motive on the part of PW3. His sole ground for rejecting the evidence of this witness as wanting in credibility were the contradictions in or conflict between his evidence and the contents of exh D20. Unfortunately the learned judge did not direct his mind to the critical question: was the evidence of PW3 so improbable that it warranted to be given no weight whatsoever? This in our respectful view constitutes a serious misdirection on the part of the learned judge. Additionally, except for a very cursory reference to PW4 and PW5 there is nothing in his grounds of judgment to show that he considered and evaluated the evidence of these witnesses.

[8] The learned deputy public prosecutor has argued that the learned judge misdirected himself when considering the circumstantial evidence that was adduced before him. We think there is merit in this complaint. It is patent from the learned judge's evaluation of the individual items of circumstantial evidence that he found no single item of these to incriminate the respondents. Among the circumstances relied upon the prosecution are the following.

A First, the close proximity of both respondents to the proscribed drug. The public prosecutor says that this points to knowledge of the nature of the drug. Here it is important to recall to mind the decision in *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197 where it was held that close physical proximity to an offending exhibit is a circumstance which must be taken into account in B determining the mental element, such as knowledge, of a particular offence. That case concerned an accused who was charged with the offence of assisting in carrying on a public lottery. The evidence showed that the accused was found by the police in a room sitting about three feet away from a dressing table on which the offending exhibits were found. The magistrate acquitted C the accused on the ground that possession of the exhibit had not been proved. An appeal by the public prosecutor was allowed. There was, of course, an additional element in that case. The accused there had attempted to close the door on the police officers who sought entry into the room. But there are also additional circumstances in the present instance. And that brings us to the D next item of circumstantial evidence. The second fact relied upon by the prosecution is the flight of the respondents when the police identified themselves. Learned counsel for the respondents has argued that mere flight or absconding is insufficient. There are a number of cases including *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 where it has been held E that evidence of mere flight is insufficient to establish guilt. But if you look carefully enough at all these cases, in each of them flight by the accused was the only circumstance relied upon by the prosecution to bring home the charge. In the present appeal flight is not the only circumstance relied upon. The third item of circumstantial evidence is the motorcycle itself. It was F established at the trial that this vehicle belonged to the first respondent's brother (PW6) who, a few months after his father's demise on 11 June 2001 had given it away to the first respondent. The fourth circumstance is the fact that the first respondent was seated on the motorcycle when first seen by PW3 and PW5. The fifth and final circumstance is the fact of recovery of the G cannabis from the carrier of the motorcycle.

[9] It may well be true that each of the foregoing circumstances when taken by itself is insufficient to bring home the charge against the respondents. But H the governing principle is quite different. It is the combined effect of several strands of circumstantial evidence that must be considered by a trial court. As stated by Thomson CJ in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307:

I > In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but

also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[10] A careful reading of the judgment under appeal reveals that the learned trial judge did not apply the test laid down in *Chan Chwen Kong*. This in our judgment constitutes a serious misdirection. With great respect, we are of the view that there was no proper evaluation by the learned judge of the circumstantial evidence led by the prosecution. It must be borne in mind that to establish its case of trafficking against the respondents the prosecution was relying on the presumption under s 37(da) of the Act. In order to determine whether that presumption applied it was essential for the learned judge to find as a fact whether the respondents or either of them were found in possession of the cannabis in question. This exercise was not carried out by the learned judge. However, based on the combined strength of the individual strands of the circumstances adumbrated earlier in this judgment a reasonable tribunal properly directing itself on the law and the facts would have come to the conclusion that the totality of the evidence reasonably supported an irresistible prima facie inference that the respondents were found in possession of the proscribed drug. In other words they had mens rea possession of the drugs in question. We need not rehearse all the circumstances to which we have already referred in coming to this conclusion. Suffice to say that the close proximity, taken together with the evidence of flight and the possession of the motorcycle by the first respondent supports the inference that there was mens rea possession on his part. As for the second respondent, the learned judge acquitted him on the ground that there was lacking in the prosecution's case evidence of a common intention because there was nothing to show a prearranged plan as required by s 34 of the Penal Code. However it is settled law that a prearranged plan is not synonymous with a premeditated crime: for, a prearranged plan may be formed instantaneously. See *Mahbub Shah v Emperor* AIR 1945 PC 118. As observed by Bose J in *Pandurang v State of Hyderabad* AIR 1955 SC 216:

> The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly …

These are matters which the learned judge, with respect, overlooked when dealing with the liability of the second respondent.

[11] But it must be said in fairness to the learned judge he did consider several items of evidence which in his view dispelled any conclusion of there been a common intention. We quote from his judgment:

> As for the common intention, this court finds that:
>
> (a) There is no evidence that both the accuseds came together to the place of crime either on the motorcycle (exh P 6) or otherwise;

(b) There is no evidence as to the relationship between the first and second accused;

(c) There is no evidence both the accuseds knew each other before they were both found near the motorcycle, the first accused being seated on the motorcycle and the second accused standing beside the motorcycle;

(cc) although both the accuseds were found at the scene, there was only one helmet found thereby indicating that there was only one person who came on the motorcycle and whose helmet it was had not been established.

(d) there is insufficient evidence to draw any inference if there was any prearranged plan or even a plan that was reached on the spot;

(e) there is no evidence for how long both the accuseds were chatting or talking to each other prior to the time when PW3 saw them at the scene;

(f) even if the evidence of PW3 is accepted as reliable that the first accused was seen meddling with something inside the carrier of the motorcycle where this court has found to be unreliable and not acceptable, it is still not safe and does not implicate the second accused who was standing beside the motorcycle to such an extent to find that the second accused had knowledge that the black bag or the items inside the black bag which was found by PW3 on a search conducted inside the carrier of the motorcycle had contained dangerous drugs.

[12] With respect to the learned judge the items of evidence he took into account as negativing common intention overlooked two critical pieces of evidence which linked the second respondent to the crime. First, his close proximity to the drug and his conduct in fleeing when the police identified themselves. These are strong and cogent evidence which when thrown into the balance render the circumstances identified by the learned judge in the foregoing paragraph of little or no weight. Only the respondents can say what they were doing at the place in question. Only the first respondent as the person having control of the motorcycle can say how it came to be where it was. And it is only he who can explain how the offending exhibit came to be in the carrier of the motorcycle. And it is only the respondents who can say why they were behaving in a suspicious manner as observed by the police witnesses. Unfortunately the learned judge did not adopt this approach. Nor did he ask himself the questions that naturally arise from the totality of the evidence.

[13] For the reasons already given we are persuaded that this appeal has merit. In our judgment the learned judge ought to have called upon the respondents to make their defence to the charge framed against them. We accordingly allow the appeal. The orders of acquittal and discharge are set aside. The case is remitted to the High Court with the direction to the learned judge to call upon the respondents to make their defence to the charge. On application by the learned deputy, the respondents shall be taken into custody and remanded until conclusion of the trial.

Appeal allowed.

Reported by Andrew Christopher Simon